No. 15977

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM ALEX KARIAKIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

Regulations

Statutes

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BRIEF OF APPELLEE.

I.
JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on October 2, 1957, under Section 462 of Title 50, United States Code, Appendix, for knowingly refusing and failing to report for induction into the Armed Forces of the United States as ordered to do by his local board [Tr. 3-4].

After the appellant was arraigned and pleaded not guilty, he was tried in the United States District Court for the Southern District of California, Central Division, before the Honorable Harry Westover, without a jury, on December 27, 1957. At the close of taking evidence and argument of counsel, the court took the case under submission. On January 27, 1958, the court found the appellant guilty as charged in the Indictment. On February 10, 1958, appellant was sentenced to the

custody of the Attorney General for imprisonment for a period of three years [Tr. 4-5].

The District Court had jurisdiction of the cause of action under 50 U. S. C. Appendix 462, and 18 U. S. C. 3231.

II.
STATUTE INVOLVED.

The Indictment in this case was brought under Section 462 of Title 50, Appendix, United States Code, which provides in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ."

III.
STATEMENT OF THE CASE.

On October 2, 1957, appellant was indicted for knowingly failing and refusing to report for induction into the Armed Forces of the United States on October 4, 1956, as he was ordered to do by his local board. Appellant pleaded not guilty and the case was set for trial. On December 27, 1957, appellant was tried by the court without a jury. The appellant's Selective Service file was received in evidence, and the Government rested. The appellant (through his trial attorney, J. B. Tietz) then

filed and served a written motion for Judgment of Acquittal. (Appx. No. 1.)

After counsel for both sides argued the matter, the court took the case under submission. On January 27, 1958, the court rendered its decision: guilty as charged. On February 10, 1958, appellant was sentenced to three years imprisonment.

On February 13, 1958, appellant filed a Notice of Appeal [Tr. 6].

On April 22, 1958, appellee received appellant's Statement of Points and Designation of Record which was filed in the District Court. On May 12, 1958, appellee received appellant's Statement of Points which was filed in this court [Tr. 11]. In both of these documents appellant asserted the identical three points upon which he intended to rely in this appeal.

It is to be noted that these same three points were alleged as grounds for a Judgment of Acquittal in the trial court.

Appellant in his brief argues the following points:

1. The evidence is insufficient to sustain the conviction.

2. By its action in reopening the question of appellant's classification, the local board barred the prosecution of appellant.

A. Preliminary statement.

B. The Court was estopped to prosecute appellant.

C. The action of the local board on November 1, 1956, constituted a remission.

3. Appellant has been deprived of due process of law.

A. All actions of the local board after January 16, 1954, are void.

(1) The purported grant of authority is void.

(2) Assuming, arguendo, that the purported grant of authority was valid, it was never exercised.

B. The failure of the local board to reclassify appellant on or after October 11, 1956, deprived appellant of due process of law.

4. Appellant has been once in jeopardy.

Appellee invites a comparison of the grounds alleged for acquittal, the statement of points upon which appellant intended to rely on in this appeal, and the points argued in appellant's brief.

IV.
STATEMENT OF THE FACTS.

June 12, 1950, appellant registered with Local Board 113, Alhambra, California [Exs. 1, 2].*

June 11, 1951, appellant returned his Classification Questionnaire (SSS Form 100) to Board 113, in which he signed Series XIV indicating that he claimed conscientious objection to participating in war [Exs. 5-11].

June 18, 1951, appellant returned the Special Form for Conscientious Objector (SSS Form 150) which Board 113 sent him the week before, and in it he claimed exemption from participation in war in any form because

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*Ex. refers to Government's Exhibit 1; Appellant's Selective Service File.

of his membership in the Russian Molakon Spiritual Jumpers Church [Exs. 163-166].

November 28, 1951, appellant was classified 1-A-O by a vote of two to nothing by Board 113, and Board 113 notified appellant of his 1-A-O classification (SSS Form 110) the next day [Ex. 12].

December 10, 1951, Board 113 received two letters from appellant in which he claimed he should have a IV-E classification and requesting a personal appearance [Exs. 161, 162].

December 14, 1951, Board 113 advised appellant when to personally appear before them [Ex. 160].

December 19, 1951, appellant personally appeared before Board 113, filed an affidavit, and at the conclusion of the appearance Board 113 by a vote of two to nothing retained appellant in 1-A-O classification [Exs. 12, 158, 159].

December 21, 1951, Board 113 notified appellant (SSS Form 110) of his 1-A-O classification [Ex. 12].

December 26, 1951, Board 113 received a letter from appellant requesting an appeal of his 1-A-O classification for a 1-O classification [Exs. 12, 157].

April 24, 1953, the Appeal Board classified appellant 1-A by a vote of three to nothing after obtaining an advisory recommendation from the Department of Justice [Ex. 12, 147-149, 156].

April 30, 1953, Board 113 notified appellant (SSS Form 110) of his 1-A classification [Ex. 12].

May 1, 1953, appellant ordered to report for his preinduction physical examination (SSS Form 223) on May 15, 1953 [Ex. 155].

May 21, 1953, Board 113 mailed appellant a Certificate of Acceptability (DD 62) indicating that as a result of his physical examination he was found fully acceptable for induction into the armed services [Ex. 154].

June 1, 1953, appellant ordered to report for induction (SSS Form 252) on June 15, 1953 [Ex. 153].

June 8, 1953, appellant's induction postponed until further notice by State Director of Selective Service and appellant so notified (SSS Form 264) by Board 113 [Ex. 150-152].

June 23, 1953, Mr. C. T. Shirley, Dean, Campus and Athletics, East Los Angeles Junior College, wrote a letter to the Presidential Appeal Board concerning appellant [Ex. 146].

July 27, 1953, Board 113 advised appellant his postponement is over and ordered him to report for induction (C-190) on August 11, 1953 [Ex. 144].

August 11, 1953, appellant reported for induction and refused to submit to induction [Exs. 138-143].

September 2, 1953, Board 113 reported appellant to the United States Attorney, Los Angeles, California, as a delinquent (SSS Form 301) for his refusal to submit to induction [Exs. 136, 137].

January 12, 1954, appellant was tried in the United States District Court, Southern District of California (Case 23221-CD) for refusing to submit to induction, and the Honorable Peirson M. Hall acquitted him on the grounds that the Department of Justice Hearing Officer had committed a procedural error [Ex. 129].

January 13, 1954, Board 113 requested permission to reopen and reclassify appellant [Ex. 128].

February 16, 1954, Board 113 was given permission to reopen and reclassify appellant [Ex. 127].

February 16, 1954, appellant classified 1-A by a vote of three to nothing, and was so notified (SSS Form 110) the next day [Ex. 12].

February 25, 1954, appellant wrote to Board 113 requesting a personal appearance or an appeal [Ex. 126].

March 10, 1954, Board 113 notified appellant that he was to personally appear before them on March 17, 1954 [Ex. 125].

March 17, 1954, appellant personally appeared before Board 113 [Exs. 123, 124], and filed three affidavits [Exs. 120-122] and, after his appearance, he was classified 1-A by a vote of three to nothing [Ex. 13].

March 18, 1954, Board 113 notified appellant (SSS Form 110) of his 1-A classification [Ex. 13].

March 23, 1954, appellant submitted his own résumé of his appearance before Board 113 on March 17, 1954 [Exs. 117-119].

March 30, 1954, appellant appealed from his 1-A classification for a 1-0 classification [Ex. 115].

October 14, 1954, appellant classified 1-A by the Appeal Board by a vote of three to nothing [Ex. 106] after an F.B.I. investigation [Ex. 110-112] and a recommendation from the Department of Justice [Exs. 107-109].

October 19, 1954, Board 113, notified appellant (SSS Form 113) of his 1-A classification [Ex. 13].

December 1, 1954, appellant ordered to report for induction (SSS Form 252) on December 16, 1954 [Ex. 105].

December 14, 1954, appellant's induction postponed until December 30, 1954 because of the Christmas holidays.

December 28, 1954, appellant wrote to Board 113 and advised them he was not going to report on December 30, 1954 for induction [Ex. 99].

December 30, 1954, appellant did not report for induction [Ex. 13].

January 5, 1955, Board 113 received appellant's file and by a vote of two to nothing decided not to reopen his classification, and so notified appellant (C-140) the next day [Exs. 13, 98].

January 17, 1955, Board 113 wrote to appellant and advised him of a meeting set up for him [Ex. 97].

January 18, 1955, Board 113 wrote to appellant and advised him that their letter of January 17, 1955 was in error and he should disregard it [Ex. 96].

March 3, 1955, Board 113 reported appellant to the United States Attorney, Los Angeles, California, as a delinquent (SSS Form 301) for his refusal to report for induction [Exs. 91, 92].

June 16, 1955, Board 113 wrote to the United States Attorney requesting that appellant's file be returned to them for processing under Operations Bulletin #123, and also that appellant's name be removed from SSS Form 302 [Exs. 81-86].

June 17, 1955, Board 113 received appellant's Special Form for Conscientious Objector (SSS Form 150) in

which appellant claimed exemption from both combattant and noncombattant service [Exs. 87-90].

June 21, 1955, the United States Attorney gave Board 113 permission to remove appellant's name from SSS Form 302 and process him under Operations Bulletin #123 [Ex. 80].

July 6, 1955, Board 113 wrote to appellant and requested that he personally appear before the Board on July 11, 1955 [Ex. 79].

July 11, 1955, appellant personally appeared before Board 113 at which time his classification was reopened and Board 113 by a vote of three to nothing classified him 1-A [Exs. 14, 78].

July 12, 1955, Board 113 notified appellant (SSS Form 110) of his 1-A classification [Ex. 14].

July 25, 1955, Board 113 received a letter from appellant appealing his 1-A classification for a 1-O classification [Ex. 76].

August 23, 1956, Appeal Board classified appellant 1-A by a vote of three to nothing [Ex. 75], after a supplemental F.B.I. investigation [Exs. 71, 72], and a recommendation from the Department of Justice [Ex. 69, 70], a copy of which was sent to appellant [Ex. 73].

August 27, 1956, Board 113 notified appellant (SSS Form 110) of his 1-A classification [Ex. 14].

September 21, 1956, Board 113 ordered appellant to report for induction (SSS Form 252) on October 4, 1956 [Ex. 68].

October 3, 1956, Board 113 received a letter from appellant in which appellant stated he was a conscientious objector and would refuse to report for induction [Ex. 65, 66].

October 4, 1956, appellant failed to report for induction [Ex. 14].

October 9, 1956, Board 113 wrote to appellant asking him to appear before the Board on or before October 15, 1956 [Ex. 26].

October 11, 1956, appellant appeared before Board 113 at which time he completed a Dependency Questionnaire (SSS Form 118) claiming no one was wholly or partially dependent upon him for support [Exs. 22-25], and he filed a copy of his letter Board received on October 3, 1956 [Ex. 21].

November 1, 1956, Board 113 received appellant's file and by a vote of two to nothing decided not to reopen his classification but to process him in accord with Local Board Memo 14 [Ex. 14].

November 2, 1956, Board 113 wrote to appellant advising him that they had considered his letter and his Dependency Questionnaire and that the facts presented therein did not warrant reopening or reclassification of his case [Ex. 20].

December 11, 1956, Board 113 reported appellant to the United States Attorney, Los Angeles, California, as a delinquent (SSS Form 301) for his failure to report for induction on October 4, 1956 [Exs. 15, 16].

October 2, 1957, appellant was indicted by the Federal Grand Jury sitting in Los Angeles, California, for failing to report for induction as ordered on October 4, 1956 [Tr. 3-4].

V.
ARGUMENT.

Preliminary Statement.

Appellee did not object to appellant's designation of record or the lack of designating as part of the record his own written and filed "Motion for Judgment of Acquittal" because his "Statement of Points by Appellant" [Tr. 11] did not raise any points that were not raised in the trial court by the "Motion for Judgment of Acquittal." However, "Appellant's Opening Brief" raises arguments that (1) were not raised in the trial court, and (2) were not designated as points appellant intended to rely on upon this appeal. It is for this reason that appellee has provided this court with a copy of appellant's "Motion for Judgment of Acquittal" (see Appendix to Appellee's Brief).

Appellee urges this court to disregard each and every argument appellant has raised for the first time in his appeal brief. The principle and the rule are too well established that an appellant cannot do what appellant here is attempting to do, namely, raise matters on appeal that were not raised at the time of trial.

POINT ONE.

The Evidence Is Sufficient to Sustain the Conviction.

Appellant's argument on this point is two-fold: the local board did not comply with Selective Service Regulation 1642.4(b) because there is no SSS Form 304 in appellant's file [Ex. 1]; and there is a "total lack of valid, relevant, material inculpatory evidence" to show that appellant failed to report for induction as ordered.

Both of these arguments are demonstrably without merit.

Appellant cites under the heading "Applicable Regulation" Section 1642.4(b), which in essence requires a local board to place a delinquency notice (SSS Form 304) in a registrant's file when such registrant is declared to be delinquent. Appellee admits that no such notice was placed in appellant's file. The real issue here is whether or not Section 1642.4(b) is in fact applicable to this case.

Selective Service Regulation 1602.4 defines delinquent as follows:

> "1602.4. Delinquent. A 'delinquent' is a person required to be registered under the selective service law who fails or neglects to perform any duty required of him and the provisions of the selective service laws."

Appellant herein is a "delinquent" because he failed or neglected to perform a required duty, namely: report for induction into the armed forces, which is admittedly a duty under the provision of the selective service laws, and he was so declared to be on December 5, 1956 [Ex. 5].

Selective Service Regulations 1642 (including 1642.1 to 1642.46) deal with the subject of "Delinquents." Regulations 1642.1 to 1642.4 are grouped under the heading of "General" meaning that these regulations set forth the general rules on the subject of "Delinquents." Appellant claims 1642.4(b) controls in this case. Obviously subsection (b) of Regulation 1642.4 must be read and understood in the light of the other subsections to the same regulation, and particularly in light of subsection (a).

Regulation 1642.4 provides in full:

> "1642.4. Declaration of Delinquency Status and Removal Therefrom.—(a) Whenever a registrant has

failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.

"(b) When the local board declares a registrant to be a delinquent, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall complete a Delinquency Notice (SSS Form No. 304), in duplicate, setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant at his last known address and file the copy in his Cover Sheet (SSS Form No. 101).

"(c) A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time. When the local board removes a registrant from delinquency status, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall advise the registrant of such removal by letter a copy of which shall be filed in his Cover Sheet (SSS Form No. 101)."

Subsection (a) of this regulation clearly and unequivocally does not apply to appellant when it precludes from consideration thereunder a registrant who fails "to comply with an Order to Report for Induction." Subsection (b) of the same regulation does not in any way expand or enlarge the applicability of the regulation as set forth in subsection (a). Hence it is indisputable that Regulation 1642.4(b) does not apply to this appellant.

Appellee submits that the regulations which pertain to appellant's delinquency are 1642.41 through 1642.46 which make specific mention of registrants who fail to report for induction, and thus the well-known rule that the special statute prevails over the general statute is applicable here.

Regulation 1642.41(a) provides:

> "1642.41(a). Report of Delinquent to United States Attorney.—(a) Every registrant who fails to comply with an Order to Report for Induction (SSS Form No. 252) or an Order for Transferred Man to Report for Induction (SSS Form No. 253) shall be reported promptly to the United States Attorney on Delinquent Registrant Report (SSS Form No. 301); provided that if the local board believes by reasonable effort it may be able to locate the registrant and secure his compliance, it may delay the mailing of such Delinquent Registrant Report (SSS Form No. 301) for a period not in excess of 30 days. A copy of such Delinquent Registrant Report (SSS Form No. 301) shall be placed in the delinquent's Cover Sheet (SSS Form No. 101). The local board may report any other delinquent registrant to the United States Attorney by letter stating all the circumstances. A copy of such letter shall be placed in the delinquent's Cover Sheet (SSS Form No. 101)."

It is submitted that not only does this regulation explicitly control this case, but that the local board followed this regulation in every detail [Exs. 15-16].

The other prong of appellant's argument appears to be that the only proof of whether or not appellant failed or neglected to report for induction is contained in appellant's selective service file (which was received in evi-

dence without objection) and certain statements in documents which are a part of that file are hearsay.

On September 21, 1956, appellant was ordered to report for induction on October 4, 1956 [Ex. 68]. Appellant received this order and acknowledged receipt of it when he wrote a letter to Local Board 113 on October 1, 1956, in which he said "I William Alex Kariakin have received your notice to report for induction into the Armed Service" [Exs. 65-66]. In this same letter appellant stated that he "must refuse" to enter the armed service. On October 8, 1956, four days after appellant was to be inducted into the armed service, Board 113 received the papers from the induction station indicating that appellant failed to report for induction [Ex. 14]. On October 9, 1956, Board 113 wrote to appellant and asked him to come to their office before October 15, 1956 [Ex. 26]. On October 11, 1956, appellant went to the office of Board 113 where he completed a Dependency Questionnaire (SSS Form 118) and wrote out a copy of his letter of October 1, 1956 [Exs. 21-25], and each of these documents was signed and dated (October 11, 1956) by appellant. Thus one week after appellant should have been inducted into the armed service he appeared at Board 113 and reduced to writing his refusal to report for induction. Appellant argues that the typed statement of the clerk of Board 113 which appears on the reverse side of the Delinquent Registration Report (SSS Form 301) [Ex. 16], namely:

> "On October 4, 1956 the registrant refused to report for induction. He claims to be a conscientious objector and that his beliefs in God and his commandments will not allow him to enter the Armed Forces"

is hearsay. We do not dispute this. The entire selective service file of the appellant is to some extent hearsay; however, not only was this same file received in evidence without objection from appellant, but even if appellant had objected, such a file is admissible into evidence as an official record kept in the regular course of business under the provisions of Rule 44 of the Federal Rules of Civil Procedure. Appellee feels that in the light of the foregoing facts a discussion of the materiality, probative value and legal effect of admissible hearsay is not warranted. Government's Exhibit 1, appellant's selective service file, contains not only a sufficient amount of evidence to support the judgment of conviction, but the evidence contained therein is valid, material, relevant and was properly received in evidence.

POINT TWO.

The Local Board Did Not Reopen or Reclassify Appellant After September 21 1957, When It Ordered Him to Report for Induction.

Appellant's argument on this point is not too clear to appellee, but it appears that appellant claims that Board 113 reopened appellant's classification and reclassified him 1-A after he was ordered to report for induction in 1956, and this was done under Regulation 1642.14. From this appellant argues that the trial court was estopped to prosecute appellant and this same action constituted a remission on the part of Board 113. The arguments of estoppel and remission are raised for the first time on appeal.

In appellant's third argument (denial of due process), in subsection B, appellant argues the reverse side of his own argument above when he states that the failure

of Board 113 to reclassify appellant on or after October 11, 1956 constituted a denial of due process of law. Thus, appellant argues Board 113 reclassified him and hence committed a remission and estopped the court from prosecuting; and at the same time appellant claims Board 113 did not reclassify him so he was denied due process of law.

Appellant is apparently attempting to place appellee upon the horns of a dilemma by arguing: either Board 113 reopened and reclassified appellant after he had been ordered to report for induction, and thus estopped prosecution and remitted the violation; or Board 113 did not reopen and reclassify appellant at that time, and this failure denied appellant the right to an appeal which is a denial of due process of law.

There appears to be some fuzzy thinking on this point, but appellee shall endeavor to shave the point clean.

The chronology of events must be kept clearly in mind.

September 21, 1956—appellant was ordered to report for induction on October 4, 1956.

October 1, 1956—Appellant wrote a letter which Board 113 received on October 3, 1956, in which appellant stated he refused to report for induction.

October 4, 1956—appellant did not report for induction.

October 9, 1956—Board 113 wrote to appellant and asked him to come to their office.

October 11, 1956—Appellant went to Board 113's office where he (1) completed a Dependency Questionnaire and (2) again wrote that he would not report for induction.

November 1, 1956—Board 113 by a vote of two to nothing received—not reopened—appellant's file and decided to process it in accordance with Local Board Memo 14.

November 2, 1956—Board 113 sent appellant Form C-140 advising him that they did not reopen his case or reclassify him.

December 5, 1956—Board 113 by a vote of two to nothing declared appellant delinquent and that he should be reported to the United States Attorney as a delinquent.

December 11, 1956—Appellant was reported to the United States Attorney as a delinquent.

At no time in this sequence of events did Board 113 ever purport to reopen the case or reclassify the appellant; yet it is appellant's claim that when the Board said "review" on November 1, 1956, it was actually "reclassifying." There is nothing to support this claim: neither evidence nor argument. No explanation is tendered as to why the board did not really do what it said it did; and no legal reasoning is proffered as to why this court should conclude as a matter of law that the board was as a matter of fact "reclassifying" when it reports that it merely "received." Appellant merely states: "from the procedure which was followed, it is apparent that the local board followed Section 1642.14 pertaining to personal appearance, reopening and appeal" (Appellee's Br., pp. 8, 9). Appellee submits that it is far more apparent that Board 113 "reviewed" appellant's file, unanimously voted not to reopen or reclassify, advised appellant of their action, declared appellant delinquent, and reported him to the United States Attorney as a delinquent. Also, as a matter of Selective Service procedure, Board

113 could not have been following Regulation 1642.14 as appellant suggests because this regulation had no application to this case at that time. Section 1642.14 deals with registrants who are delinquent because of a failure to perform a duty *other than* failure to report for induction (See Regulations 1642.4, 1642.10, 1642.12 and the use of the phrase "under provision of this part" as used in 1642.14). Furthermore, Regulation 1642.14 deals with delinquent registrants and appellant was not declared delinquent until after this claimed reopening and reclassifying took place. Hence, since Section 1642.14 was inapplicable to this case, Board 113 was not following it.

Thus, we see that Board 113 did not reopen or reclassify appellant at any time after September 21, 1956, and appellant's new arguments of estoppel to prosecute and remission are never reached as they both depend upon the question of whether Board 113 "reviewed" or "reclassified" being answered: "reclassified."

This brings us to the second horn of dilemma: Board 113 denied appellant due process of law by its failure to reopen and reclassify him after October 11, 1956. Appellee is willing to admit that if Board 113 should have reopened and reclassified appellant at this time, then it denied appellant due process of law by denying him the right to a personal appearance and/or appeal which follows a reclassification.

Part 1625 entitled: "Reopening and Considering Anew Registrant's Classification" of the Selective Service Regulations are controlling on the point.

> "1625.2. When Registrant's Classification May Be Reopened and Considered Anew.—The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the regis-

trant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

"1625.3. When Registrant's Classification Shall Be Reopened and Considered Anew.—(a) The local board shall reopen and consider anew the classification of a registrant upon the written request of the State Director of Selective Service or the Director of Selective Service and upon receipt of such request shall immediately cancel any Order to Report for Induction (SSS Form No. 252) which may have been issued to the registrant.

"(b) The local board shall reopen and consider anew the classification of a registrant to whom it has mailed an Order to Report for Induction (SSS Form No. 252) whenever facts are presented to the local board which establish the registrant's eligibility for classification into Class I-S because he is satis-

factorily pursuing a full-time course of instruction at a college, university, or similar institution of learning.

"1625.4. Refusal to Reopen and Consider Anew Registrant's Classification.—When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified, or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required."

Regulation 1625.2 allows the local board to reopen and reclassify upon the board's own motion or upon the written request of another when accompanied by written information presenting facts not considered when the registrant was classified which, if true, would justify a change in classification. There is no doubt at all that Board 113 did not reopen and reclassify appellant upon its own motion. There is also no specific written request by anyone to reopen appellant's classification; however, it

is arguable that appellant's letter of October 1, 1956, is such a request, and for the sake of argument let us so treat it. There must be written information accompanying the request, and in his letter appellant claims to be a conscientious objector. Appellant was classified 1-A many times and this same claim was considered many times, so obviously, this is not information which was not considered when appellant was last classified, August 23, 1956. If we stretch the regulation a little further and hold that the written information appellant supplied on October 11, 1956 in his Dependency Questionnaire "accompanied" his written request to reopen, then the claim still fails because: first, it is not new information; and second, even if it were new and it was true, it would not justify a change in classification as appellant therein stated that no one was dependent upon him. This same regulation also provides that the board "shall not" reopen a registrant's classification after an Order to Report for Induction has been mailed and unless it "first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." Here appellant was under such an Order to Report for Induction, and it is apparent that the Board not only did not specifically find the necessary change in appellant's status, but it could not have so found because there was no such change. Therefore, Section 1625.2 as applied here prohibited Board 113 from reopening appellant's classification.

Regulation 1625.3 directs the local board to reopen in certain limited cases, and has no application to the facts of this case.

Regulation 1625.4 provides that when a registrant (or others not applicable here) files a written request with

the local board to reopen his classification and the local board determines that the information accompanying such request fails to present new facts which, if true, would justify a change in classification, then the local board shall not reopen, and shall advise registrant accordingly. Once again, assuming that appellant's letter of October 1, 1956 is a request to reopen and the information it contains plus the information contained in the Dependency Questionnaire accompanied said request, then Board 113 fully complied with this section when on November 2, 1956, it wrote to and advised appellant that it was not reopening his classification based upon such information [Ex. 20].

Appellant cites two cases which he contends holds "that where a registrant protests the local board's classification and claims an exemption but introduces no new evidence, the board has the duty to again classify and send him another notice of classification" [Appellee's Br., p. 10]. The two cited cases are:

United States v. Stiles, 169 F. 2d 455 (3rd Cir. 1948);

United States v. Adamowicz, 119 F. Supp. 635, 1954.

In the *Stiles* case the court was called upon to construe Section 625.2 of the old act, which is now Section 1624.2 of the present act, which gives a registrant a right to personal appearance within ten days of being mailed a notice of his classification. Neither the holding nor any principle laid down in that case is controlling or even applicable here.

In the *Adamowicz* case the registrant had been classified IV-E, and when this classification was eliminated

in favor of a new designation (1-O) the local board, acting on orders from the State Director, reclassified the registrant. This reopening and reclassifying was done upon the local board's own motion and at a time when the registrant was not under an order to report for induction.

Appellee believes the following cases sustain his position on these regulations just cited.

Wyman v. La Rose, 223 F. 2d 849 (9th Cir. 1955), cert. den., 350 U. S. 884;

Feuer v. United States, 208 F. 2d 719 (9th Cir. 1953);

United States v. Bartelt, 200 F. 2d 385 (7th Cir. 1952).

It is apparent then that Board 113 did not and should not reopen and reclassify appellant at any time after September 21, 1956, and appellant has not been denied a rightful opportunity to appeal.

POINT THREE.

All Actions of Board 113 After January 16, 1954, Are Not Void.

This too is an argument that is raised for the first time on appeal.

Appellant argues as follows: June 1, 1953, Board 113 ordered him to report for induction on June 15, 1953; he was then indicted, tried, and acquitted for refusal to submit to induction, after which the local board requested and received authority to reopen and reclassify appellant from the District Coordinator; the District Coordinator lacks authority to act in such a situation; hence everything done or attempted since January 13, 1954 was void. Appellant argues further that even if the District Co-

ordinator had such authority, the local board violated Section 1625.14 because it did not cancel the order to report for induction that was issued on July 27, 1953, and hence all actions since that date are void.

Again the chronology of events must be clearly elucidated.

June 1, 1953—Board 113 ordered appellant to report for induction on June 15, 1953.

June 8, 1953—State Director of Selective Service postponed appellant's induction until further notice.

July 27, 1953—Board 113 advised appellant his postponement was over and he is to report for induction on August 11, 1953.

August 11, 1953—Appellant reported as ordered but refused to submit to induction.

January 12, 1954—Appellant was tried and acquitted for his refusal to submit to induction on August 11, 1953.

January 13, 1954—Board 113 requested permission to reopen and reclassify appellant from the District Coordinator.

February 16, 1954—Board 113 received the requested permission from the District Coordinator.

From this sequence of events it is clear that the order to report for induction of July 27, 1953 is not a new order to report but merely a continuance of the order of June 1, 1953. And it was this very same order that was the basis of the prosecution in 1954 which resulted in appellant's acquittal.

Regulation 1604.1 and subsection (g) provide:

> "1604.1. The Director of Selective Service shall be responsible directly to the President. The Director

of Selective Service is hereby authorized and directed:

"(g) To delegate any of his authority to such officers, agents, or persons as he may designate, and to provide for the subdelegation of any such authority."

Also see Regulations 1604.14 and 1605.31.

The letter from the District Coordinator to Board 113 says:

"Under the authority vested in me by the State Director of Selective Service for the State of California, the registrant's classification is hereby reopened under the provisions of Section 1625.3."

Thus it is clear then that the State Director has authority to delegate his powers and, in fact did delegate his powers, to his District Coordinator.

Appellee admits that there is nothing in the file to indicate that the Order to Report for Induction was canceled; however, appellee also points out that there is nothing in the file to show that this order was not canceled. In other words, the only way to determine whether or not this order to report for induction was canceled is to look at the subsequent treatment it received. Obviously the appellant ignored this order to report once he was found not guilty; and it is equally apparent that Board 113 (if it did not in fact cancel it) treated it as canceled.

We also ask what is the legal effect of the Order to Report for Induction after the District Court entered a judgment of acquittal as to the very same order? Appellee submits that the judgment of acquittal has the legal effect of rendering that order to report for induction null and void. And assuming the local board did

not cancel this order, it is axiomatic to state that the court will not require a useless act. Also, still assuming the order was not canceled, appellant's conclusion that everything done thereafter by the local board is void is a barefaced, unsupported, and unwarranted conclusion. Appellant is saying, in effect, that cancellation in this instance is jurisdictional, and this is unsupportable. One final point in this regard is that it is quite apparent that appellant has been in no way prejudicial if the order was not canceled.

POINT FOUR.

Appellant Was Not Once in Jeopardy.

This asserted defense of double jeopardy is raised for the first time on appeal.

The cases are clear that although a judgment of acquittal is a final determination of a pending charge in a selective service prosecution, it does not preclude further processing by the selective service system or a subsequent successful prosecution for failure to comply with another order.

United States v. Nugent, 200 F. 2d 46 (2nd Cir. 1952), reversed on other grounds, 346 U. S. 1;

United States v. Hufford, 103 F. Supp. 859.

The fact that a registrant was convicted and served a prison sentence for violation of a selective service law does not preclude prosecution for a subsequent violation of the law after his release from confinement.

United States v. Palmer, 223 F. 2d 893 (3rd Cir. 1955), cert. den., 350 U. S. 873;

Goodrich v. United States, 146 F. 2d 265 (5th Cir. 1944).

Conclusion.

Appellee respectfully submits that:

1. The evidence is sufficient to sustain the conviction.

2. The local board did not and should not reopen his case and reclassify appellant at any time after September 21, 1956 when it ordered appellant to report for induction.

3. The actions of the local board after January 16, 1954 or at any other time were not and are not void.

4. The appellant has not been once in jeopardy.

5. The judgment of the trial court should be sustained.

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APPENDIX.

In the United States District Court in and for the Southern District of California. No. 26241.

United States of America, Plaintiff vs. William Alex Kariakin, Defendant.

Motion for Judgment of Acquittal.

May It Please the Court:

Now comes the defendant and moves the court for a judgment of acquittal for each and every one of the following reasons:

1. There is no evidence to show that the defendant is guilty as charged in the indictment, in that the local board waived his failure to report at the induction station, and did not thereafter send him another Order to Report.

2. The Government has wholly failed to prove a violation of the Act and Regulations by the defendant as charged in the indictment.

3. The denial of the conscientious objector status by the selective service system and the recommendation by the Department of Justice and Board of Appeal were without basis in fact, arbitrary, capricious and contrary to law.

4. Defendant was denied procedural due process in that the local board failed to have available an Adviser to Registrants and to have posted conspicuously or any place, the names and addresses of such adviser, as required by the Regulations, and to defendant's prejudice.

5. The local board deprived defendant of his procedural rights to an Appearance before Local Board and

to an administrative appeal when it failed to formally reclassify him on or after October 11, 1956.

6. The plaintiff has failed to show that jurisdiction existed in the Selective Service System empowering it to issue to defendant a valid induction order.

/s/ J. B. Tietz
J. B. Tietz
Attorney for Defendant